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Via Fax (866-418-0232) and USPS

September 30, 2008

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commission Members:

Attached are comments in the matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) of the United States Code. If additional information or clarification is needed regarding these comments, please contact me at PO Box 3069, Raleigh, NC 27602-3069 or via e-mail at carcher@nclm.org.

Thank you in advance for your consideration of our comments.

Sincerely yours,

Charles B. Archer
Associate Director

Attachment (4 pages)

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	WT Docket No. 08-165

COMMENTS OF THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES

These Comments are filed by the NORTH CAROLINA LEAGUE OF MUNICIPALITIES to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The NORTH CAROLINA LEAGUE OF MUNICIPALITIES also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

When Congress enacted Section 332(c)(7) in 1996, it preserved much of the substantive authority of local governments, while including minor limitations. Authority to approve the placement, construction and modification of wireless facilities was left in the hands of state and local governments. *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999). Congress intended the text of paragraph § 332(c)(7) to embody the sum total of the federal regulation over local authority of wireless facility siting.

> Section 332(c)(7)(A) of the of the Communications Act of 1934 states:
> Except as provided in this *paragraph*, nothing in this *chapter* shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities.

47 U.S.C. § 332(c)(7)(A) (1996)(emphasis added). The word "chapter" refers to Chapter 5 of the Communications Act of 1934, which is entitled Wire and Radio Communication. Section 332(c)(7) is located in Subchapter III – Special Provisions Relating to Radio, Part I – General Provisions, of Chapter 5. As provided in § 332(c)(7)(A), ***no other*** text or provisions within

Chapter 5, Wire and Radio Communication limits or affects the authority of State or local governments with respect to the placement, construction, or modification of personal wireless facilities.

Section 253 is found within Chapter 5 of the Communications Act of 1934; specifically within Subchapter II – Common Carriers, Part II - Development of Competitive Markets. Because § 253 is within Chapter 5 and because § 332(c)(7) specifically provides that nothing else within Chapter 5 limits or affects local authority, the Commission cannot use § 253 to limit, affect, or preempt any aspect of local authority with respect to the placement, construction, or modification of personal wireless facilities. As such, 47 U.S.C § 253 cannot be used to curtail local government authority over wireless facility siting.

This conclusion is further supported by the fact that Congress does not enact redundant code provisions. Section 332(c)(7)(B)(i) provides:

> (i) The *regulation* of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

The term regulation covers not just decisions on individual wireless facility applications, but ordinances, processes and procedures relating to the placement, construction, and modification of wireless facilities in general. Similarly, Section 253(a) provides that no local government regulation may prohibit or effectively prohibit the provision of telecommunications services. The language of the provisions is virtually identical, but it is clear that § 332 is specific to wireless service facilities, while § 253 address telecommunications generally. The Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Therefore § 332(c)(7)(B)(i)(II), which specifically governs wireless services, governs to the exclusion of § 253 as to the remedies and procedures to be followed with respect to wireless services facilities.

Further, if § 253 were to apply to wireless facilities, § 332(c)(7)(B)(i)(II) becomes completely redundant and unnecessary. The United States Supreme Court has refused to interpret statutory provisions to create redundancy. "The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'" *US v. Alaska*, 521 US 1, 59 (1997), *quoting Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). On these bases, the Commission should deny CTIA's Petition for Declaratory Relief with respect to the application of § 253 to land use ordinances governing wireless facility applications.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity.

"Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress specifically foreclosed CTIA's request that the Commission establish timelines for decision-making on particular types of applications. Congress made it crystal clear that the time period for rendering a decision was to "be the usual time period under such circumstances." *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. *207-208 (1996)*. Congress also made it abundantly clear in § 332(c)(7)(B)(ii) that the personal wireless service industry is to be treated just as any other land use applicant with respect to what is a reasonable amount of time for the processing of requests.

> Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, *the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.*

*H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. *207-208 (1996).*

Decisions on personal wireless service providers' applications under relevant zoning ordinances and process are to be rendered in the same time frame as are "generally applicable" for other zoning decisions. Congress was so clear in its intention that is felt necessary to state the same principle in two consecutive sentences.

As the above illustrates, Congress intended that local governments be able to act on wireless siting proposals just as they act on all other zoning requests, with the limitation that local government actions cannot discriminate unreasonably between providers, cannot prohibit or effectively prohibit the provision of wireless services, and cannot regulate wireless facilities on the basis of radio frequency emissions. However, even with these limitations, Congress intended that local authorities exercise their authority to make decisions on applications on a case by case basis, as the facts and circumstances allow, within the time period generally followed by each individual local government. Local governments know Congress intended wireless facility applications to be handled as other land use applications are handled. CTIA knows this. The Commission knows this. Accordingly, the Commission should deny CTIA's petition.

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings, others are required by state and local law to follow certain processes and procedures. To give the Commission background in the land use application

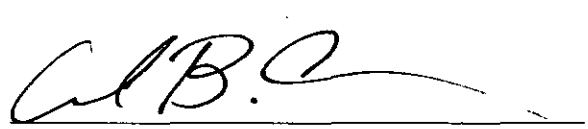
procedures required in NORTH CAROLINA, we have taken the liberty of citing various state statutory provisions which govern wireless facility siting in NORTH CAROLINA. We also explain how these provisions affect the timing for review of applications.

In 2007 the North Carolina General Assembly passed legislation (North Carolina General Statute 160A-400.53) using the Wireless Infrastructure Association (PCIA) Model. This act states: Local governments may not require information relating to the "business decisions" of wireless companies, but may review public safety, land use or zoning issues addressed in its adopted regulations, including aesthetics, landscaping, land-use based location priorities, structural design, setbacks and fall zones. Local governments may also require applicants for new wireless facilities to evaluate the reasonable feasibility of collocating new antennas and equipment on an existing structure within the applicant's search ring. The bill creates a streamlined permit approval process for collocations of wireless devices. For those collocations entitled to streamlined processing, local governments must inform applicants within 45 days of whether an application for a collocation is complete. Decisions on streamlined collocation applications must be issued within 45 days. Consultants' fees are to be incorporated into a permit or application fee. The act became effective December 1, 2007. The provisions of this legislation and subsequent law were negotiated in good faith by all parties concerned, including the wireless companies.

CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to the clear language of the statute and contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works as Congress designed it. It is not within the Commission's purview to rewrite the Communications Act of 1934 to suit the wireless industry.

Respectfully submitted,



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